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In the United States Court of Appeals For the Seventh Circuit

No. 12106.

R. B. JAMES, and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On petition to review and set aside an order of the Federal Trade Commission.

BRIEF AND ARGUMENT FOR PETITIONERS AND APPENDIX.

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STATEMENT OF FACTS.

This proceeding is brought under Sec. 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 5 to issue a cease and desist order to restrain the petitioners from shipping punchboards in interstate commerce to persons and firms who use said devices to distribute merchandise in intrastate transactions. The Trial Examiner after hearings made his findings of fact and issued a cease and desist order (a. 4). The Commission on appeal from the Trial Examiner's ruling adopted the Examiner's find-

ings and order (a. 7-14). The petitioner herein is asking this Court to set aside this order.

The errors relied on arise out of the Commission's failure to make sufficient findings of fact to support the order.

The Commission found that the petitioners ship punchboards in interstate commerce to other persons, firms, and corporations who use some of the said devices to conduct lotteries or games of chance in the distribution of merchandise (a. 6).

SUMMARY OF ARGUMENT.

Petitioners in their argument point out first that the authorities relied upon by the Commission in its opinion (a. 7) are not in point or controlling herein because the findings of fact in the case at bar are substantially different from the findings in the cited cases.

The Commission does not claim to have jurisdiction over the interstate shipment of gambling or lotteries devices. Its contention is that its authority in this field is limited to the interstate shipping of punchboards which are used in intrastate transactions to distribute merchandise. The Commission makes this contention on the grounds that the intrastate use of punchboards to distribute merchandise is against the public policy of the United States and that such use induces and encourages the public to gamble. We argue that this contention is unsound and fallacious because all forms of gambling and the use of all gambling devices are just as much against the public policy of United States as is the use of punchboards and the use of other gambling devices induce and encourage the public to gamble even more than does the use of punchboards. Therefore, there is no reason to single out punchboards.

We argue that there cannot be a federal public policy in relation to an intrastate transaction.

We argue that this case is contrary to and in conflict with the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349 (a case wherein the Supreme Court affirmed a decision of this Court).

Petitioners, further, contend that the case at bar is contrary to the case of *U.S.* v. *Perry Halseth*, 342 U. S. 277.

CONTESTED ISSUE.

The contested issue is, are the findings of fact sufficient to sustain the order?

PROPOSITIONS OF LAW.

I.

The Commission does not have jurisdiction to issue a cease and desist order restraining the interstate shipping of punchboards, neither on the ground that the use of said devices when used to distribute merchandise in intrastate commerce is against the public policy of the United States nor that it induces and encourages the public to gamble.

II.

That this case is contrary to and in conflict with the case of Federal Trade Commission v. Bunte Bros. Inc., 312 U.S. 349.

III.

That this case is in conflict with the case of U. S. v. Perry Halseth, 342 U.S. 277.

IV.

That there cannot be a federal public policy as to an intrastate transaction.

ARGUMENT.

The Findings of Fact are not sufficient to sustain the Order.

Our position will be made clearer if we call the Court's attention to the following two allegations in the complaint upon which the Commission did not introduce evidence and did not make findings of facts upon:

> "Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices."

and

> "The respondents thus supply to, and place in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act."

These two allegations establish beyond doubt that the Commission in its complaint proceeded on the theory that the intrastate use of punchboards is an "unfair method of competition". However, the Commission abandons this theory in its findings, as there is no finding of competition, and of course no finding as to injury to competition.

The Supreme Court in the case of *F. T. C.* v. *Raladam*, 283 U.S. 643, established the law to be that there must be three factors in an unfair method of competition (1)

there must be competition, (2) an unfair practice within that competition, and (3) the unfair practice must be injurious to that competition.

The absence of findings of facts on these allegations distinguish the case at bar from all of the cases quoted from in the Commission's opinion (a. 7). In every case relied upon by the Commission in its opinion (a. 7) there were findings supporting these allegations. As the finding of facts in those cases were different than the finding of facts in the present case those cases are not in point. To support this point we cite the case of *J. C. Martin Corporation et al.* v. *Federal Trade Commission,* 242 F. 2d 530 at page 533, wherein this Court said:

> "Since there is no finding here concerning the relative values of petitioners' merchandise, the *Wolf* case is not controlling."

The Commission having abandoned the theory of its complaint adopts in its findings a theory that is set out in a case cited in the Commission's opinion (a. 7), but there is no quotation from it. In this case, *Feitler* v. *F. T. C.,* 201 F. 2d 790, the Court said page 793:

> "We agree that the Commission's authority does not extend to the interstate shipment of gambling devices as such, but only to such shipments as amount to unfair trade practices. *Lichtenstein* v. *Federal Trade Commission, supra.* But the jurisdiction of the Commission in this case does not depend upon any particular effect of the operation of punch boards and push cards upon merchandising competition, but upon the single fact that these devices, unlike most other gambling devices, are used as a *means of selling or distributing merchandise* which is opposed to the public policy of the United States. This was made abundantly plain in the *Lichtenstein* case, *supra.* It

> is the fact that the interstate shipment of these devices facilitates *a kind of merchandising* which induces and encourages the public to gamble which makes such shipment an "unfair trade practice." Proof that the use of punch boards in the gambling disposition of merchandise has no effect upon trade in the same kinds of merchandise by other means could not have affected the question of the Commission's jurisdiction."

Petitioners contend that it is illogical and unsound to hold as the Court did in the above quotation that on the one hand the Commission does not have authority over interstate shipping of gambling devices as such, but on the other hand that it does have authority over the interstate shipping of punchboards which are used to distribute merchandise in intrastate commerce because such use is against the public policy of the United States and induces and encourages the public to gamble.

It certainly cannot be denied that all gambling devices are as much against the public policy of the United States as are punchboards, and in addition other gambling devices induce and encourage the public to gamble far more than does the use of punchboards. Therefore, it cannot logically be held that Congress intended to give the Commission jurisdiction over the interstate shipment of punchboards on the sole grounds that their use is against the public policy of the United States and induces and encourages the public to gamble, when it did not give authority over the interstate shipment of gambling devices as such.

The order is in conflict with the case of F.T.C. v. Bunte Bros. Inc., 312 U.S. 349.

The Supreme Court in the case of *F.T.C.* v. *Bunte Bros. Inc.*, 312 U.S. 349, (affirming a decision of this Court) held

that the Federal Trade Commission does not have jurisdiction over intrastate transactions.

At this point it must be borne in mind that the operation of punchboards to distribute merchandise is always an *intrastate* transaction.

The Commission is proceeding on the theory that the acts complained of herein are "unfair acts" in interstate commerce. In construing the words "unfair acts" as used in the Federal Trade Commission statute the holding in the *Bunte* case (page 7 herein) must be the basis upon which the construction of the statute must be predicated. Therefore, in construing the statute we must start with the fact that the Supreme Court has held that Congress did not give the Commission jurisdiction over the intrastate use of punchboards, in other words, Congress did not feel that the intrastate use of punchboards is of such an injurious nature as to be brought within the corrective action of the Commission. Notwithstanding this, the Ninth Circuit in the *Feitler* case (p. 6 herein) held that Congress did give the Commission jurisdiction over the act of furnishing the punchboards which are used in these intrastate acts. As Congress did not give the Commission authority over the act of using the punchboards it cannot logically be held that Congress intended to give authority over the act of just furnishing the punchboard.

The order is contrary to the case of U. S. v. Perry Halseth, 342 U.S. 277.

The Supreme Court in this case held that the shipping of punchboards in interstate commerce did not violate any Federal Statute. Without a finding that the use of punchboards to distribute merchandise has an unfair effect on competition the order herein is contrary to this case.

There Cannot Be a Federal Public Policy in Relation to Intrastate Transactions Which Transactions Have No Direct Effect Upon Interstate Commerce.

The Trial Examiner rested the entire decision upon the erroneous holding that the Commission's jurisdiction rested upon the sole fact that the intrastate use of punch boards to distribute merchandise is against the public policy of the Government of the United States.

Under our dual system of government as established by the constitution of the United States it is impossible to have a Federal public policy concerning intrastate transactions which do not have any effect upon interstate commerce. Such a policy would be a clear and unjustifiable encroachment by the Federal Government upon the sovereign rights of the states and would be clearly in direct conflict with the Tenth Amendment. Such a rule of law would clearly be in conflict with the admonition set out in the case of *Keller* v. *U. S.*, 213 U.S. 138, 149;

> "To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'."

Let us first have a clear and complete understanding of the law of public policy. The following from the case of *Julien* v. *Model Building, Loan & Investment Co.*, 92 N. W. 561, 565, 116 Wis. 79, 61 L.R.A. 668 is the clearest explanation of this point that we have found. The Court in this case at page 565 said,

> "It is the province of the statesman and not of the lawyer to discuss, and of the *Legislature to determine*,

> *what is best for the public good*, and to provide for it by proper enactments. It is the province of the judge to expound the law, *to declare public policy as he finds it in the unwritten and written law.* Public policy is a proper ground for a decision only in the sense of the policy of the law, *not in the sense of mere judicial notions as to what is best for the public good*". (Emphasis supplied)

The Court in the case of *Building Service Employees International Union, Local 262 et al.* v. *Gazzam*, 339 U. S. 532, at 537 & 538 said,

> "The public policy of any state is to be found in its constitution, acts of the Legislature, and decisions of its courts. Primarily it is for the lawmakers to determine the public policy of the State, *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353."

In following this discussion it is vital that we bear in mind that the practice of selling goods by means which involve a game of chance, gift enterprise, prize or lottery, is always an intrastate transaction. This fact is admitted, there is absolutely no question about it.

It is important to note that the 9th Circuit Court in announcing that the practice of selling goods by the use of a game of chance is contrary to the established public policy of the Government of the United States, did not refer to any provision of the Constitution or any enactment of Congress. It appears that the Court just announced the rule without having any legislative enactment upon the subject, or higher judicial precedent.

Therefore, let us discuss the limits of the power of the court with regard to the establishment of public policy. From the above quotations it is self-evident that the courts do not have the power to create, initiate or legislate a principle of public policy; their power is strictly limited to

declaring public policy as it exists in the law of the forum in which the court has jurisdiction. That is to say, that the Federal Courts do not have power to declare a Federal public policy, their authority is limited to announcing the Federal Public Policy as is found either in the Constitution or a constitutional enactment of Congress. If the Court's power is not confined within these limits the courts would be exercising clearly a legislative function which certainly would be in direct violation of the Constitution's division of the Legislative, Judicial and Executive functions. As the judiciary does not have power to create a federal public policy concerning intrastate transactions the next questions are, first, does the constitution declare a public policy towards the intrastate use of chance to distribute merchandise? (2) Has Congress passed a constitutional enactment declaring such a public policy? (3) Would Congress have the power to pass such an act, with regards to such intrastate transactions?

If there is to be found in the Constitution that such a practice is contrary to the public policy of the Federal Government, the law must be that by virtue of the Constitution the common law is made a part of and incorporated into Federal Law. In other words, if the common law is not a part of the Federal Law, then the Constitution does not contain any pronouncement that intrastate transactions are contrary to a Federal Public Policy.

The law is settled beyond controversy that the Constitution does not incorporate the common law as a part of the Federal Law. On this point the Court in the case of *Erie Railroad Co.* v. *Tomkins*, 304 U.S. 64, at 78:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be

> local in their nature or general, * * *. And no clause in the constitution purports to confer such a power upon the Federal Courts."

In the same case at page 79 the court says that there cannot be a rule of law "that there is a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute". The court therein emphasizes the fact that courts do not have "the power to use their judgment as to what the rules of common law are". The court then goes on and says,

> "But the law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else * * * The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

In this connection it is well to consider the case of *Keller* v. *U. S.*, 213 U.S. 138. This case involved an enactment by Congress declaring it a crime for anyone to harbor an alien prostitute. Certainly if any acts which are exclusively intrastate should be declared against the Federal public policies, prostitution should, if it does not lead the list, it should be among the very top. However, the court held the act unconstitutional and in doing so at page 148 said,

> "That there is a moral consideration in the special facts of this case, that the act charged as within the scope of the police power, is immaterial, for, as stated,

there is in the Constitution no grant to Congress of the police power".

And at 149 said,

> "To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White,* 7 Wall, 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'."

In connection with Congress' power over intrastate transactions, the Supreme Court said in the case of *U. S.* v. *Vassar,* 72 U.S. 462 and 471,

> "Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the constitution except such as is strictly incidental to the exercise of powers clearly granted to the Legislature".

In the case of *Carter* v. *Carter Coal Co.,* 298 U.S. 238 at 295, the court said,

> "The preservation of the states and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. * * * Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal government in the direction of taking over the powers of the states is that the end of the journey may find the states despoiled of their powers * * *".

And the Court says at pages 291 and 292,

> 'The proposition, often advanced and as often discredited, that the power of the Federal Government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.''

To hold that such a practice is contrary to the Federal public policy, is contrary to the case of *U. S.* v. *Halseth,* 342 U.S. 277. This case involved the question of shipping punch boards in interstate commerce which were to be used to distribute merchandise in intrastate commerce. The court held that such conduct did not violate any Federal Law whatsoever. This case clearly established that Congress has never and never intended to pass an act declaring that the intrastate use of chance to distribute merchandise is against the public policy of the Government of the United States.

From the above and foregoing it is established that the Federal Courts, that is the Judicial Branch of the Federal Government, does not have authority or power to establish, create initiate, or formulate a Federal public policy concerning the use of chance to distribute merchandise in intrastate commerce; it is, also, established that the Constitution does not contain such a public policy, that Congress has not declared one and that Congress does not have the power to do so.

Therefore, it is self-evident that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, is not contrary to the established public policy of the United States.

CONCLUSION.

In conclusion, for the reasons hereinabove stated petitioners respectfully urge that this Court set aside the "cease and desist" order of the Commission entered herein.

Respectfully submitted,

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